TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members. The ACLU is dedicated to preserving and protecting the Bill of Rights. The Civil Liberties Union of Massachusetts is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of prisoners. The ACLU and the National Prison Project have entered into a number of consent decrees in prison and jail cases, and thus have a particular interest in the standard to be applied to motions to modify consent decrees. The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

STATEMENT OF THE CASE

The amici adopt respondents' statement of the case as their own.

SUMMARY OF ARGUMENT

The basic premise of the petitioners' argument is that they are entitled to modification of the consent decree because the agreement to forego double celling in the Suffolk County Jail went beyond the relief that the Constitution would have required by its own force. Petitioners' argument, however, is fatally flawed because this Court's decision in Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986), permits a court to enter a consent decree that goes beyond constitutional minima.

If a federal court has jurisdiction to enter a consent decree that may go beyond constitutional minima, there can be no jurisdictional bar to enforcement of the consent decree as written, and governmental

defendants are not automatically entitled to modification simply because a consent decree now appears to provide more relief than required under the Constitution. Contrary to petitioners' argument, this Court has never held that a change in decisional law by itself justifies modification of a consent decree, unless the change produces an affirmative conflict with the legal basis of the consent decree.[1]

Petitioners purport to embrace the standard for modification of institutional consent decrees set forth in New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). The standard utilized by the Carey court, however, did not require modification of a consent decree simply because it went beyond the requirements of

---

[1] Although a change in decisional law does not require automatic modification, it may be a relevant factor in considering equitable modification. See p.4, infra.

the Constitution. Rather, the Carey court appropriately looked to the central remedial purposes of the consent decree in considering a motion to modify. The trial court here correctly applied the Carey standard and, based on the remedial purposes of this decree, denied modification.

Amici acknowledge that, under Carey, a change in the law may be relevant to equitable modification, even if modification is not automatically required. In this case, however, there has been no change in the controlling law. Both before and after the consent decree in this case, whether or not the double celling of pretrial detainees violated the law turned on the factual circumstances of the individual case. By signing the consent decree, the petitioners waived any challenge to the existence of factual circumstances justifying a ban on double celling.

Enormous practical difficulties would accompany adoption of the petitioners' contention that a modification must be granted at the request of the government unless conditions resulting from the modification would affirmatively violate the Constitution. Each request for modification would be likely to require a full retrial of the case, since whether or not conditions in a jail violate the Constitution necessarily turns on the interaction of a number of conditions. Moreover, adoption of petitioners' standard would require courts to make predictive judgments as to whether the conditions resulting from the modification would violate the Constitution. The facts in this case, in which the jail was designed specifically for single celling, and staff cannot effectively monitor activity in the cells on a continual basis, well illustrate the pitfalls of attempting to make such a prediction. Because the issue is one

of equity, the trial court should have the discretion to deny a modification that has the potential to cause serious violence, even if the trial court cannot make a judgment that the level of violence resulting from the modification would necessarily violate the Constitution.

Accordingly, the trial court should be guided by the central remedial purposes of the parties in considering a motion to modify. This is in fact the standard applied in Carey, which petitioners purport to embrace. The trial court correctly applied the Carey standard in this case, and denied modification because granting it would have destroyed a central element of the parties' bargain, the agreement to single cell the jail.

The modification standard advocated by petitioners goes well beyond Carey and would greatly discourage settlement of institutional litigation. However much all

parties wished to settle a case, they would be unable to enter into a consent decree with any assurance that it would be enforced. Those consent decrees that were entered would be subject to repeated motions for modification, further crowding the dockets of the federal courts. Petitioners' modification standard would disrupt freely negotiated agreements that maximize the gain of all parties, and remove incentives for correctional officials to comply with such agreements. Finally, such a standard would be fundamentally incompatible with basic principles of federalism, which require that states and localities be free to enter into binding agreements that they believe to be in their interest.

ARGUMENT

I. PARTIES MAY AGREE TO, AND COURTS MAY ENFORCE, RELIEF IN A CONSENT DECREE THAT GOES BEYOND THE REQUIREMENTS OF FEDERAL LAW

A. Local No. 93 Authoritatively Rejects the Argument that the Relief Granted in a Consent Decree Is Limited to the Relief That a Federal Court Could Have Granted After Trial

At the heart of petitioners' argument is the claim that governmental agencies are entitled to modification of prison and jail consent decrees unless granting the modification would result in conditions that affirmatively violate the Constitution. See Rufo Brief at 23-24; see also Rapone Brief at 30. A necessary corollary of petitioners' argument is that a trial court is barred from entering a consent decree that incorporates relief beyond that required under the Constitution. For the reasons given below, this argument fails. A court may enter a consent decree that provides relief consistent with the Constitution, even if

some aspects of the decree may not be independently required by the Constitution. It follows that a court of equity is not required to undertake a de novo determination of whether every feature of a remedial plan is independently required by the Constitution whenever a defendant seeks modification.

Neither 42 U.S.C. §1983 nor the Fourteenth Amendment bars a federal court from entering a consent decree in which state or local officials agree to a remedy for a constitutional violation that is different from the remedy that a federal court might order after trial if the case were litigated:

> [A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings," and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is not necessarily barred from entering a consent decree merely

> because the decree provides broader relief than the court could have awarded after a trial.

Local Number 93 v. City of Cleveland, 478 U.S. 501, 525 (1986) (citations omitted). See also Local 93 at 522: "[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree."

Petitioners argue that Local No. 93 applies only to entry of a consent decree, not to the modification of a consent decree. Rufo Brief at 25; Rapone Brief at 44. It is true that the Court in Local No. 93 distinguished between the entry of a decree and certain modifications of a consent decree. That discussion, however, distinguished the entry of consent decrees from attempts to modify a consent decree to provide greater relief than the parties originally agreed to, over the objection of a defendant. Id. at 528. Local No. 93

acknowledges that under Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), a court in a Title VII case cannot modify an injunction over a defendant's objections in order to provide greater relief than the court could order following trial. Local No. 93, 478 U.S. at 527-28. This is a completely different issue from the enforceability of a consent decree as written.

B. A Federal Court Is Not Required to Modify a Consent Decree Simply Because It May Exceed Constitutional Minima

If a federal court has jurisdiction to enter a consent decree that goes beyond constitutional minima, there can be no jurisdictional bar to enforcement of the consent decree as written, and defendants are not automatically entitled to modification.

The petitioners rely primarily on System Federation No. 91 v. Wright, 364 U.S. 642 (1961), and Pasadena City Board of

Education v. Spangler, 427 U.S. 424 (1976), to support their argument that a federal court must release a state from obligations it agreed to in settlement negotiations if those obligations go beyond what federal law requires (Rufo Brief at 23-26; Rapone Brief at 34-35). Neither case applies to the facts here.

System Federation involved a consent decree that had come into direct conflict with the statute on which it was based, the Railway Labor Act. This Court decided that, in view of an amendment to the Act subsequent to the entry of the consent decree, the trial court abused its discretion by refusing to modify the decree. System Federation, 364 U.S. at 651-53. See also Local No. 93, 478 U.S. at 526-527. System Federation does not establish a blanket rule that all subsequent changes in the law require modification.

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), similarly does

not establish a principle that every intervening development in the law requires a court to modify a consent decree. In Spangler, this Court considered the developments in the law in light of the particular circumstances of that case:

> The ambiguity of the [challenged] provision itself, and the fact that the parties to the decree interpreted it in a manner contrary to the interpretation ultimately placed upon it by the District Court, is an added factor in support of modification. The two factors taken together make a sufficiently compelling case so that such modification should have been ordered by the District Court. System Federation v. Wright, supra.

Id. at 438. By contrast, in the present case there is no suggestion that the single celling provision petitioners seek to modify is in any way ambiguous.[2]

---

[2] Similarly, Board of Educ. of Oklahoma City P. Sch. v. Dowell, 111 S.Ct. 630 (1991), does not support petitioners' argument. First, there is a fundamental distinction between school desegregation cases and prison and jail cases. School systems have an obligation not to impose racial segregation, but they have no affirmative obligation to reverse racial segregation not resulting from governmental

acts. See, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). Prison and jail officials, in contrast, have an affirmative obligation to provide the basic necessities required under the Eighth Amendment and the Due Process Clause to convicted prisoners and pretrial detainees. See, e.g., DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005-1006 (1989) and Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Accordingly, a one-time achievement of constitutionality in a prison or jail case does not give the same assurance of continued constitutionality as does achievement of a unitary school system. Second, even in the context of school desegregation, Dowell does not hold that momentary achievement of constitutional standards entitles a governmental entity to relief. Rather, the standard in Dowell is whether the school board has demonstrated that it "had complied in good faith with the desegregation decree since it was entered and whether the vestiges of past discrimination had been eliminated to the extent practicable." 111 S.Ct. at 638.

Petitioners also cite language from Milliken v. Bradley, 418 U.S. 717 (1974), and Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), regarding limitations on the scope of federal remedial relief in litigated cases. Under the analysis in Local No. 93, such limitations do not apply to cases that result in consent decrees.

c. Adoption of the Carey Standard[3] Does Not Imply That Consent Decrees Must Be Modified Simply Because the Relief Provided Goes Beyond Constitutional Minima

Although the petitioners purport to rely on New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir.

[3] The trial court denied the petitioners' motion for modification under both the standard in United States v. Swift & Co., 286 U.S. 106, 119 (1932) ("Swift II"), and the standard in New York State Association for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). Inmates of Suffolk County Jail v. Kearney, 734 F.Supp. 561, 565 (D.Mass. 1990). Therefore, this brief addresses the propriety of the trial court's action only under the more liberal Carey standard, without necessarily endorsing every aspect of the Carey holding.

Though less exacting than the Swift test for modification, the Carey standard is far from toothless. See Section III, infra. Because petitioners seek a standard requiring modification unless the modification would affirmatively violate the Constitution, petitioners seek a standard substantially more liberal than that set forth in Carey. Thus, the argument of amicus State of New York—that plaintiffs in institutional cases have continued to enter into consent decrees under the Carey standard—is irrelevant to the argument made by petitioners.

1983), cert. denied, 464 U.S. 915 (1983), petitioners ignore the fact that Carey itself did not propose a standard that required modification of all relief going beyond constitutional requirements.[4] Rather, the court looked at the central purpose of the

---

[4] The Carey court did note that this Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), was a factor supporting defendants' request for modification, but it did not suggest that the Youngberg decision could justify a modification inconsistent with the central purpose of the decree; indeed, the court's language suggests the opposite:

> Once the defendants had established, as they unquestionably did, that abandoning the 15/10 and 6/3 bed limitations in favor of a 50 bed limitation would facilitate the emptying of Willowbrook and like institutions, the question was whether...in Justice Powell's formu'ation, "the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." [Youngberg v. Romeo], 457 U.S. at 321.

Carey, 706 F.2d at 971. See also the language from Carey quoted at p.35, infra.

consent decree, which was to move the mentally retarded out of "such a mammoth institution as Willowbrook," and whether defendants' proposed modification would further that goal. Id. at 969. The Carey court concluded that modification would not disturb the central purpose of the decree; indeed, it was essential to achieving the primary objective of the decree. Id. Here, by contrast, the modification sought by petitioners would violate the very essence of the decree. See pp. 37-38, infra.

Petitioner Rufo cites decisions from six other appellate courts as supporting his position on modification. (Rufo Brief at 20). Of these decisions, only Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984), appears to endorse a standard requiring modifications down to constitutional minima. Indeed, the latest decision of the Fourth Circuit in Plyler v. Evatt, 924 F.2d 1321 (4th Cir. 1991) ("Plyler II"), extensively addresses

this issue and clarifies the court's earlier decisions, cited by petitioners, in Plyler v. Evatt, 846 F.2d 208 (4th Cir. 1988), cert. denied, 488 U.S. 897 (1988) ("Plyler I"), and Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc):

> This was much too draconian a reading of Plyler I's holding on that point. As a moment's reflection will show, so to read that decision would necessarily imply that the only legally enforceable obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. For the practical effect would be that every effort by the plaintiff class to enforce specific provisions of the decree could be effectively countered by a motion by the state to modify so long as the modification did not generate unconstitutional conditions overall. Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action.

Plyler II, 924 F.2d at 1327. (Emphasis in original).

II. THERE HAS BEEN NO INTERVENING CHANGE IN THE LAW JUSTIFYING MODIFICATION

For the reasons given in Section I, even if this Court had held, subsequent to entry of the consent decree in this case, that double celling can never be unconstitutional, such a ruling would not have automatically entitled the petitioners to modification of the consent decree.[5]

In this case, however, no such changes in the law have occurred. This Court has never held, or implied that it would hold, that double celling is constitutional under all circumstances. Bell v. Wolfish, 441 U.S. 520

---

[5] The Court may nonetheless decide that a change in the law, unanticipated by the parties, is a change in circumstances that may justify equitable modification. Both the Swift II and Carey standards recognize that certain changes in the law may justify equitable modification. The respondents propose that, in the event that the Court does not continue to apply the Swift II standard, the standard that the Court adopts include consideration of changed circumstances that were not anticipated by the parties. Changed circumstances in appropriate cases could include changes in decisional law.

(1979), reversed an order, entered after a trial on the merits, requiring single celling at a detention center. This Court engaged in a detailed, fact-based inquiry into the adequacy of conditions and found that under the particular circumstances of that case there was no constitutional violation. Bell did not change the principle that under certain conditions, double celling in a jail may constitute punishment in violation of the due process clause, and certainly did not render single celling inconsistent with federal law. Thus, the trial court correctly found that Bell did not directly overrule the law on which the consent decree was based. Inmates of Suffolk County Jail v. Kearney, 734 F.Supp. 561, 564 (D.Mass. 1990).

Accordingly, in a fundamental sense the law was the same before and after Bell: whether or not the double celling of pretrial detainees violates the Constitution depends on the particular factual circumstances. But

the essence of consent decrees is that the parties waive, now and in the future, the right to contest the facts. See Swift & Co. v. United States, 276 U.S. 311, 329 (1928) ("Swift I"):

> Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the Court the power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, to divest themselves of their interest therein, and to abstain from acquiring any interest hereafter.

The petitioners do not dispute the fundamental rule that a federal court may enforce a consent decree whose provisions mandate appropriate remedies for all constitutional violations that would have been established if the plaintiffs had proven every factual claim they had alleged in the complaint. Here, the parties developed a remedy designed to cure the unconstitutional conditions in the old Suffolk County Jail.

The trial court was therefore justified in entering a remedy, chosen by the parties, to correct the constitutional violations.

III. IN DETERMINING WHETHER TO MODIFY CONSENT DECREES, A FEDERAL COURT SHOULD BE GUIDED BY THE CENTRAL REMEDIAL PURPOSES OF THE DECREE.

A. There Are Enormous Practical Difficulties in Petitioners' Position That the Sole Relevant Criterion Is Whether Granting the Modification Would Violate the Constitution.

Petitioners' position comes down to an argument that a consent decree should be modified at the request of governmental defendants unless the conditions resulting from the consent decree, as modified, would affirmatively violate the Constitution. For the reasons stated in Section I, supra, this position has been previously rejected by this Court.

Beyond the theoretical reasons for rejecting petitioners' position are the enormous practical difficulties that adoption of such a standard would entail. The

petitioners' contention would require trial courts to cut back any consent decree to the precise relief that would have been granted by the court after trial at that point in the litigation. Obviously, at least in prison and jail conditions cases, a defendant's request for modification would require trial of all existing conditions of confinement to determine whether the particular relief that defendants wanted to eliminate would tip the system from constitutional to unconstitutional. This is so because the Court has long recognized that prison and jail conditions do not exist in a vacuum; individual conditions that, considered by themselves, are not unconstitutional may nevertheless be remedied to address general conditions below constitutional minima:

> Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards. Petitioners do not challenge this proposition; nor do they disagree with the District Court's original conclusion that conditions in Arkansas' prisons, including its

punitive isolation cells, constituted cruel and unusual punishment. Rather petitioners single out that portion of the District Court's most recent order that forbids the Department to sentence inmates to more than 30 days in punitive isolation.

* * *

The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.

* * *

> The order is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction.... Like the Court of Appeals, we find no error in the inclusion of a 30-day limitation on sentences to punitive isolation as a part of the District Court's comprehensive remedy.

Hutto v. Finney, 437 U.S. 678, 685, 687-88 (1978).[6]

---

[6] This principle also applies to remedial orders not involving the Eighth Amendment. Once a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. Milliken v. Bradley, 433 U.S. 267 (1977) ("Milliken II"); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

Aside from the burden of multiple retrials that would be imposed on federal courts if the petitioners' argument were accepted, the standard would be enormously difficult to apply in prison and jail cases. This case provides an example of the difficulties that would attend such a standard. As respondents point out in their Statement of the Case, because the consent decree contemplated continued single celling in the jail, the parties agreed to a modification of the decree increasing the size of the jail, reducing the size of individual cells, and changing the traditional design of the cell fronts. In order to promote privacy, the parties agreed that, instead of the traditional bar-front

cell, the cell front would be solid, with a small window that offers a correctional officer an opportunity to observe events in the cell only if the officer is standing close to the front of the cell. Obviously, this design means that, in the event of double celling, only for a small fraction of the time will activities in these cells be within sight of a staff member. In addition, because these are jail prisoners, the staff will be attempting to double cell prisoners whose classification is based on observing their behavior for a very limited time.[7]

The first problem in utilizing the petitioners' standard is that the trial court would be required to make a decision about the Constitution that is completely

[7] While the prisoners are pretrial detainees, many pose serious security problems. Cf. Bell v. Wolfish, 441 U.S. 520, 533 (1979) (The presumption of innocence is irrelevant to the determination of the security measures that are appropriate to maintain safety in a jail).

predictive: would confining two persons accused of crimes, often violent crimes, for twelve hours a day, in seventy square feet of space when staff lacks continuous visual surveillance of the cell, produce an unconstitutional level of violence? In making its decision on this issue, the trial court would have no experience specific to the facility to guide it, because the facility was built, and has always been operated, as a single-celled facility.

While it is true that the trial court will know that many facilities are able to double cell without producing unconstitutional levels of violence,[8] overcrowding in many other facilities, particularly those in which the staff is unable to supervise the prisoners adequately, has resulted in unconstitutional levels of violence. See

[8] See Rhodes v. Chapman, 452 U.S. 337 (1981), and Bell v. Wolfish, 441 U.S. 520 (1979).

Rhodes v. Chapman, 452 U.S. 337, 352 n.17 (1981), citing with approval four cases in which the lower courts had issued relief against prison overcrowding. The first of these four cases was Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Among the findings cited by the court of appeals in affirming the trial court's conclusion that the prison had not offered reasonable protection from violence were the following:

> The evidence indicates that the architecture of the cellhouses and the physical layout of buildings and other structures contribute to the violence and illegal activity between inmates. The architecture of cellhouses 1 and 7, which was designed for a less mobile prison population, does not provide adequate visibility for guards to properly monitor from secure vantage points inmate movement within the cellhouse. The internal structure of the cellhouses along with the random construction of the buildings, walls, and fences within the perimeter of the prison provide numerous "blind areas" where violence, threats, and other illegal activities can occur without detection by prison officials.

Id. at 573. (Citations omitted).

The other three cases cited in Rhodes similarly involved, among other issues, a combination of overcrowding and inadequate staff supervision. See Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291, 1308-1309 (5th Cir. 1974); and Pugh v. Locke, 406 F.Supp. 318, 329 (M.D.Ala. 1976), aff'd as modified, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds, 438 U.S. 781 (1978) (per curiam). Numerous other cases have found unconstitutional levels of violence in prisons and jails, based in part on the inability of staff to observe prisoner activities. See, e.g., Alberti v. Heard, 600 F.Supp. 443, 451-452 (S.D.Tex. 1984), aff'd sub nom. Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986); Martin v. White, 742 F.2d 469, 471 (8th Cir. 1984); and Fisher v. Koehler, 692 F.Supp. 1519, 1549 (S.D.N.Y. 1988).

In essence, the trial court would be asked to wager with the lives and safety of the prisoners that, even though the opportunity for violence would rise substantially if double celling were allowed, in this particular facility the total number of deaths and injuries resulting from the modification would not be high enough by itself to offend the Constitution. Obviously, for the trial court to predict that future levels of violence[9] resulting

---

[9] In an affidavit filed with the trial court, respondents' corrections expert explained in detail why the double celling will produce a significant risk of increased violence:

> 8. Because each cell is hermetically sealed, inmates locked in effectively cannot communicate with the officer who is likely to be at the control station. If there is a fight or any kind of problem, the inmate would have to signal from within by kicking the door, pounding the enclosed window in the door, or waving at the closed window. Yelling would probably not be heard. Thus, the safety of any double-celled inmate could not be insured. If an officer is to be aware of any problem, he would have to be very

> close to the cell door rather than being able to view it from the control station. Safety of the inmates would require continuous viewing by an officer actually looking in the windows of the doors during the hours that detainees are locked in their cells.
>
> * * *
>
> 12. Under the Sheriff's proposal, 400 men would be double bunked. I do not believe that any classification system would be effective in preventing the very real possibility of assaultive or sexually abusive behavior between two men double bunked in one of these cells. It is my opinion that double bunking 200 of the cells at the new Suffolk County Jail, despite the attempts at classification, will lead to a substantial likelihood of violent behavior. Pre-trial detainees are the most difficult individuals to keep in custody. They experience much greater tension than sentenced inmates. These tensions are a result of their unexpected arrest and incarceration, their inability to communicate with their family and friends, and their not knowing how long they will be held in custody, whether they can raise the money for bail, when they will be tried, what is happening to their families and their possessions or what the outcome of their trial will be. Frequently, there is very little in the way of background information available to the Sheriff with respect to the

from granting the modification will or will not rise significantly enough to violate the Constitution is a far more difficult judgment than the judgment that a certain set of existing conditions is or is not constitutional.

Moreover, for the reasons given in Section I, supra, there is no theoretical need for the trial court to try to predict whether the degree of suffering resulting

---

detainees. In addition, there is much greater turn over with pre-trial detainees which means that it is harder to assess a constantly changing population. At the Charles Street Jail according to the Sheriff's figures, fifty percent of the detainees are released within eight days. Each of these factors makes meaningful classification extremely difficult.

13. I believe that the combination of isolation, inability to communicate, and tension caused by having two inmates in a cell designed for one will produce serious problems for the safety of the inmates and ultimately for the Correctional officers and Sheriff's staff.

A. 183-190.

from the modification will be high enough by itself to violate the Constitution. Because the issue is one of equity rather than federal court jurisdiction, the trial court ought to be able to consider whether or not the modification will produce a significant risk of harm to the plaintiff class, even if the trial court considers that risk not to rise to constitutional proportions.

B. The Trial Court Should Be Guided by the Remedial Purposes of the Consent Decree in Determining Whether to Grant Modification

For the above reasons, the Court should reject petitioners' argument that a trial court is required to modify a consent decree at the request of a defendant unless the trial court finds that the conditions resulting from the modified consent decree would affirmatively violate the Constitution.

The conclusion that the Court should reject petitioners' modification standard is buttressed by the existence of an appropriate

alternative standard that the trial court can apply. The appropriate measuring stick is not the Constitution but the remedial purposes of the decree. In amici's view, and in the view of most lower courts charged with enforcing institutional consent decrees, a proposed modification that frustrates the central remedial purposes of the decree should not be granted absent exceptional circumstances. Petitioners' contention that even the central remedial purposes of a consent decree should be subject to modification at the defendants' request, so long as the resulting judgment does not violate the Constitution, would convert consent decrees into unilateral policy statements that the government could alter whenever it chose.

Nothing in Carey supports such a radical view. To the contrary, the Carey court carefully emphasized that the central

purposes of the consent decree were left undisturbed by the modification it approved:

> Here, as in Swift, the modification is proposed by the defendants. But it is not, as in Swift, in derogation of the primary objective of the decree, namely, to empty such a mammoth institution as Willowbrook; indeed defendants offered substantial evidence that, again in contrast to Swift, the modification was essential to attaining that goal at any reasonably early date. To be sure, the change does run counter to another objective of the decree, namely, to place the occupants of Willowbrook in small facilities bearing some resemblance to a normal home, but any modification will perforce alter some aspect of the decree.

Carey, 706 F.2d at 969. (Emphasis added).

In Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), the Second Circuit reaffirmed the Carey standard and held that, in institutional reform cases, the party requesting modification must demonstrate that the modification is necessary to achieving the goal of the decree:

> The analysis must identify the essential purpose or purposes of the decree in question, and weigh the impact of the proposed modification on

that ultimate objective.

Id. at 247-248.

In an accompanying footnote, the Kozlowski court made clear that the inquiry into the purposes of the decree required an analysis separate from a constitutional analysis:

> [T]his is not a case governed by the "reasonable relation" standard. Nor is this an instance where we must "ordinarily defer to the[] expert judgment [of prison officials]." While these standards apply when evaluating the constitutionality of prison regulations, they play no role in determining whether changed conditions warrant modification of a consent decree....[I]f we simply deferred to the state's position when it was reasonably related to a legitimate interest, or abstained because we lacked competence to evaluate the offered proof, we would tip too far in the opposite direction and severely chill the use of consent decrees by rendering them mutable at any time. The standard we set forth better accommodates the need for balance.

Id. at 248 n.8.[10]

---

[10] See also id. at 245:

> As [the trial court] so aptly held, "Having entered into the consent decree rather than bringing the dispute [over remedies] to trial, [the Commissioner] cannot now evade an integral portion of that decree on the ground that it was not directly tied to a federal claim." Such a result would impugn the integrity of the court and allow the Commissioner to avoid his bargained-for obligations—while retaining the benefits of concessions he obtained on other issues during the negotiations.

(Footnote omitted).

In this case, there is a ready guide to the intent of the remedial order since the trial court, in originally adopting the plan that became the basis for the consent decree, referred to the provision of single celling as among the critical features of confinement provided for in the plan. See Memorandum and Orders as to Pretrial Detention Center, October 2, 1978. (A.55). Moreover, the absolute guarantee of single celling affected numerous other aspects of the consent decree. As discussed supra, the parties agreed to an architectural design for the cell fronts that

is appropriate for single celling but dangerous for a double-celled facility. In addition, the parties agreed to a modification reducing the size of the cell from eighty to seventy square feet in contemplation of continued single celling. Other features relating to staffing and the provision of support services such as dining and medical facilities were designed in light of the expectation of a lower total population.

Because it is apparent that the continued provision of single celling was a critical element of the parties' bargain, the trial court appropriately exercised its discretionary authority to maintain the bargain and refused the petitioners' request for modification.

IV. IMPORTANT INTERESTS ARE SERVED BY ALLOWING STATES AND LOCALITIES TO SETTLE LAWSUITS

A. The Modification Standard Advocated by Petitioners Would Make Settlement Less Attractive to Both Plaintiffs and Defendants

Ironically, governmental defendants as well as prisoners will be harmed if the Court adopts a standard that requires automatic modification of a consent decree unless the modification will itself result in unconstitutional conditions. If the Court adopts a rule under which governments cannot bind themselves to abide by the terms of a consent decree except to avoid direct unconstitutionality, plaintiffs will be disinclined to settle institutional lawsuits. Rather than face the prospect of motions for modification that would force them to litigate the constitutionality of conditions repeatedly, at any time defendants choose, plaintiffs will elect to try their case in the first instance, when the evidence is

fresh and powerful, and seek a definitive adjudication of rights from the court. Thus, governmental entities wishing to settle an institutional lawsuit may be frustrated by their inability to offer plaintiffs a binding settlement, and may be forced to undergo a complex and burdensome trial ending in judicial imposition of a remedial scheme far less appropriate and efficient than what the parties could have negotiated.

It may be contended that plaintiffs will always have an incentive to resolve litigation by consent decree, even if such decrees are easily modified at the request of defendants. According to this argument, any provision in a consent decree that goes beyond constitutional minima is a gain for plaintiffs over what they could have achieved at trial, even if it is later removed by a motion to modify.

This argument ignores the reality that, in consent decree negotiations,

plaintiffs often trade off benefits to which they are presumptively constitutionally entitled in exchange for others to which their constitutional right is not clearly established. Government officials often find that such an arrangement suits their needs as well. For example, one of the defendants' major concerns may be the timing of the remedial steps, and they may be willing to grant substantive remedies beyond what the Constitution requires in exchange for delays in the implementation. As long as such agreements are enforceable, they allow the parties to construct a remedial scheme that reflects the unique facts of the situation and the parties' particular needs and priorities.[11] However, plaintiffs are

---

[11] As outlined in the brief of amici Breed, et al., correctional officials facing litigation over prison or jail conditions often choose to resolve the suit by consent decree in order to maximize their participation in formulating the remedial plan. The range of possible remedies in conditions of confinement cases is especially broad, since these lawsuits

unlikely to give away benefits that they will probably win at trial in exchange for concessions from defendants that may not be enforced. Thus, under petitioners' proposed modification standard, settlement becomes markedly less attractive to plaintiffs.

B. Allowing Defendants Easy Modification of Consent Decrees Has the Perverse Effect of Undermining Defendants' Ability to Enter into Consent Decrees.

All parties and amici are in agreement on the utility of consent decrees

---

typically involve a number of issues. See, e.g., Brief of Petitioner Rufo at 2 (instant case involves disputes over heating, ventilation, plumbing, vermin infestation, noise levels, fire safety, food service, clothing, and overcrowding). Such conditions, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. Rhodes v. Chapman, 452 U.S. at 347. Thus, the existence or nonexistence of a constitutional violation must be determined by examining conditions "taken as a whole." Hutto v. Finney, 437 U.S. at 687. For this reason, there are, in any given case, many possible remedial plans that would cure the constitutional violation. Consent decrees enable correctional officials to participate in choosing among these possibilities.

as a means of resolving institutional litigation. See also Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887, 899 (1984). Negotiation of consent decrees, like any negotiation, involves making concessions on issues of importance to one's adversary in exchange for gains in areas important to oneself.[12] If this Court were to adopt a standard allowing routine modification of consent decrees, governments would be seriously handicapped in their attempts to

---

[12]

> [P]romising is an act done with the public intention of deliberately incurring an obligation the existence of which in the circumstances will further one's ends. We want this obligation to exist and to be known to exist, and we want others to know that we recognize this tie and intend to abide by it.

J. Rawls, A Theory of Justice, 347 (1971).

resolve lawsuits on favorable terms.[13] As Judge Posner has observed, "[n]ot even the government will benefit in the long run from being excused from having to honor its agreement; for who will make a binding agreement with a party that is free to walk away from an agreement whenever it begins to pinch?" Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc).[14]

---

[13] Allowing the parties maximum freedom to bargain promotes settlement. See Evans v. Jeff D., 475 U.S. 717, 732 (1986) ("a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement"). See also Moore v. National Association of Securities Dealers, 762 F.2d 1093, 1112 (D.C.Cir. 1985) (Wald, J., concurring in the judgment) (civil rights plaintiffs' ability to waive statutory attorney fees is useful "bargaining chip" and encourages settlement).

[14] The converse is not true. Contrary to the assertion of amici State Attorneys General (Brief of State of Tennessee, et al., at 24), there is no danger that a strict standard for modification will discourage government officials from entering into consent decrees. As explained below, the parties can, if they desire, include a provision allowing modification under whatever circumstances they choose.

C. Considerations of Finality, Efficiency, and Federalism Require Stability in Consent Decrees

"There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Ackermann v. United States, 340 U.S. 193, 198 (1950). Entry of a consent decree should be regarded, in an important sense, as the end of the case, not as a springboard for further litigation. If cases are settled without parties being meaningfully bound to comply with the terms of the settlement, post-judgment proceedings will be multiplied, parties will be required to prepare and try

---

There is, however, a danger that if modification is freely granted, defendants will be tempted to avoid burdensome or embarrassing trials by making settlement offers they do not intend to carry out or are not sure they can carry out, looking to a modification motion as an escape hatch.

the same case repeatedly, and every change in the personalities involved in the case may result in a new call for court intervention. In such a world, institutional cases would be in perpetual litigation, and the interest of governments in operating their institutions and agencies with a minimum of outside interference would be disserved.[15]

Considerations of social utility also counsel stability of consent decrees:

> [A] consent decree, like any contract, presumably represents an efficient allocation of risks between the parties to the litigation. Parties negotiating a decree normally contemplate the foreseeable risks of their positions and strike a bargain that maximizes each party's utility. Thus, absent dramatically changed conditions, modification of a consent decree is likely to reach a less efficient result than enforcement of the initial decree.

---

[15] Contrary to the assertion of amici State Attorneys General (Brief of State of Tennessee, et al., at 25), it is the proliferation of hotly-contested motions to modify consent decrees, not their strict enforcement, that will crowd the dockets of the federal courts.

Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1130 (1986) (footnotes omitted). Even if the growth in jail population were a development completely unforeseen at the time of the negotiations for the consent decree, which it was not,[16] it does not follow that the burden should now be borne by the prisoner class:

> Judge Posner and Professor Rosenfield, in their article considering modification of contracts to accommodate impossibility,[17] explained the conditions under which modification of a contract in the face of unforeseen developments might be

---

[16] See Respondents' Statement of the Case, noting that petitioners were aware of the population increases but did not seek modification until it was too late to change the design of the cell fronts to provide a safer environment for double celling. The respondents agreed to a reduction of the size of the cells to be built; that agreement was obviously premised on the parties' reliance on the consent decree's guarantee of single celling.

[17] Posner & Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Stud. 83 (1977).

efficient. If an event occurs that was unforeseen at the time of contract negotiation and that makes performance by the promisor considerably more burdensome, modification is appropriate if it would shift the loss to the party who was ex ante the superior risk-bearer, the party who could have at less cost prevented or insured against the loss. This loss shifting is efficient because, by definition, the superior risk-bearer can bear the risk at lower cost. Had the parties adverted to the potential risk at the time of negotiation, they would have shifted the risk to this party. By imposing the risk on the superior risk-bearer, the court merely achieves the result the parties would have reached through bargaining had they been aware of the problem and provides additional incentives to reach this result.

> The obligor is the only party with an active duty to perform under a consent decree. Thus, only the obligor may encounter greater costs of performance by the eventuation of an unforeseen risk. Enforcement of the initial decree without modification leaves the unforeseen costs with the obligor; modification shifts them to the beneficiary. Under Posner and Rosenfield's analysis, therefore, modification would only be appropriate if the beneficiary were better able to prevent or insure against the risk.

Jost, supra, at 1138-1139 (footnotes omitted).

In the case of consent decrees regarding jail or prison conditions, of course, the prisoner class is utterly powerless to prevent or ensure against unforeseen occurrences. In the instant case, for example, the prisoners obviously have no control over crowding at the jail. The petitioners, by contrast, have substantial ability to affect the jail's population—for example, by building or otherwise acquiring additional facilities.[18] Since petitioners are the superior risk-bearers, it would make no economic sense to shift the loss to the plaintiff class by granting the proposed modification. Such a modification would remove any incentive for petitioners, the parties better able to prevent overcrowding, to do so.

---

[18] In connection with Petitioner Rufo's motion for modification, respondents presented evidence that modular housing units could easily be installed in the rear yard of the new jail. A. 236, 266-269.

Adopting a more liberal standard for modification of consent decrees would give the parties less autonomy, not more.

> [T]he parties can always contract to permit future modification under a regime in which their contract is enforced. They cannot, on the other hand, assure stability in a regime in which the court is free to modify as it chooses. The litigants will thus prefer the more stable alternative insofar as it permits them greater choice and control.

Jost, supra, at 1129-30 n.173. For example, in the instant case the parties could have bargained for a provision in the consent decree allowing double celling in the event that jail intake exceeded capacity by a certain amount over a given period of time. However, they did not. If the petitioners' proposed modification is now approved, the respondents are bound, over their objections, to a consent decree fundamentally different from the one they signed. Cf. United States v. Ward Baking Co., 376 U.S. 327, 334 (1964) (court cannot enter a consent decree to which

a party has not agreed). See also Local No. 93, 478 U.S. at 522.

Amici State Attorneys General express concern at the prospect of government officials entering into consent decrees that bind their successors in office. Brief of State of Tennessee, et al., at 26-27. This is hardly a remarkable occurrence; government officials routinely enter into contracts and leases that bind their successors for years to come.[19] More fundamentally, however, these amici do not explain why this is a federal constitutional concern. As they point out, states have various laws limiting the ability of officials to bind their successors. Id. at 27; see also Washington v. Penwell, 700 F.2d 570, 573 (9th Cir. 1983) (provisions of Oregon Constitution). A state may well decide that allowing its officials

---

[19] Indeed, state officials often commit their successors in office to decades of debt finance payments for the capital cost of new prison construction.

to bind their successors serves its purposes in settling lawsuits, entering into contracts, and other matters of public concern. If a state makes this choice through its democratic process, principles of federalism require that a federal court not overrule it.[20] Thus, except for ensuring that state officials do not enter into consent decrees that are beyond their authority under state law, see Penwell, 700 F.2d at 573-574, federal courts have no interest in preventing state officials from entering into lawful agreements that bind future administrations.

In sum, principles of federalism require that state and local governments be

---

[20] Federal courts must be guided by "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

treated as fully competent actors, free to enter into binding agreements that they believe are beneficial to them. It would be anomalous indeed if this Court, in the name of federalism, decided that a state has less power to bind itself than an individual or a corporation.

CONCLUSION

For the above reasons, the amici urge the Court to affirm the decisions of the lower courts.

Respectfully submitted,

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALEXA P. FREEMAN
ALVIN J. BRONSTEIN
NATIONAL PRISON
PROJECT OF THE
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
1875 Connecticut Ave. NW
Suite 410
Washington, DC 20009
(202) 234-4830

JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL
LIBERTIES UNION
132 West 43 Street
New York, NY 10036

JOHN REINSTEIN
CIVIL LIBERTIES
UNION OF MASS.
19 Temple Place
Boston, MA 02111

Attorneys for Amici Curiae

Date: May 31, 1991